

ASSEMBLY BILL

No. 1723

Introduced by Assembly Members Lieu and Emmerson

February 3, 2010

An act to amend Section 240 of, and to add Section 1390 to, the Evidence Code, relating to evidence.

LEGISLATIVE COUNSEL'S DIGEST

AB 1723, as introduced, Lieu. Evidence: admissibility of statements.

(1) Existing law defines “unavailable as a witness,” for purposes of the Evidence Code, to mean that the declarant is, among other things, exempted or precluded on the ground of privilege, disqualified, dead, or absent for a specified reason.

This bill would supplement that definition to add the circumstance that the declarant is persistent in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so.

(2) Existing law, known as the “hearsay rule,” provides that, at a hearing, evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated is inadmissible. Existing law also provides exceptions to the hearsay rule to permit the admission of specified kinds of evidence.

This bill would provide that evidence of a statement that is offered against a party who has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness is not made inadmissible by the hearsay rule. The bill would require the party seeking to introduce a statement to establish, by a

preponderance of the evidence, that the elements of this provision have been met at a foundational hearing, as specified.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 240 of the Evidence Code is amended to
2 read:
3 240. (a) Except as otherwise provided in subdivision (b),
4 “unavailable as a witness” means that the declarant is any of the
5 following:
6 (1) Exempted or precluded on the ground of privilege from
7 testifying concerning the matter to which his or her statement is
8 relevant.
9 (2) Disqualified from testifying to the matter.
10 (3) Dead or unable to attend or to testify at the hearing because
11 of then existing physical or mental illness or infirmity.
12 (4) Absent from the hearing and the court is unable to compel
13 his or her attendance by its process.
14 (5) Absent from the hearing and the proponent of his or her
15 statement has exercised reasonable diligence but has been unable
16 to procure his or her attendance by the court’s process.
17 (6) *Persistent in refusing to testify concerning the subject matter*
18 *of the declarant’s statement despite an order of the court to do so.*
19 (b) A declarant is not unavailable as a witness if the exemption,
20 preclusion, disqualification, death, inability, or absence of the
21 declarant was brought about by the procurement or wrongdoing
22 of the proponent of his or her statement for the purpose of
23 preventing the declarant from attending or testifying.
24 (c) Expert testimony—~~which~~ *that* establishes that physical or
25 mental trauma resulting from an alleged crime has caused harm
26 to a witness of sufficient severity that the witness is physically
27 unable to testify or is unable to testify without suffering substantial
28 trauma may constitute a sufficient showing of unavailability
29 pursuant to paragraph (3) of subdivision (a). As used in this section,
30 the term “expert” means a physician and surgeon, including a
31 psychiatrist, or any person described by subdivision (b), (c), or (e)
32 of Section 1010.

1 The introduction of evidence to establish the unavailability of a
2 witness under this subdivision shall not be deemed procurement
3 of unavailability, in absence of proof to the contrary.

4 SEC. 2. Section 1390 is added to the Evidence Code, to read:

5 1390. (a) Evidence of a statement is not made inadmissible
6 by the hearsay rule if the statement is offered against a party that
7 has engaged or acquiesced in wrongdoing that was intended to,
8 and did, procure the unavailability of the declarant as a witness.

9 (b) (1) The party seeking to introduce a statement pursuant to
10 subdivision (a) shall establish, by a preponderance of the evidence,
11 that the elements of subdivision (a) have been met at a foundational
12 hearing.

13 (2) Hearsay evidence, including the hearsay evidence that is the
14 subject of the foundational hearing, is admissible at the
15 foundational hearing. However, a finding that the elements of
16 subdivision (a) have been met shall not be based solely on the
17 uncontroverted hearsay statement of the unavailable declarant, and
18 shall be supported by independent corroborative evidence.

19 (3) The foundational hearing shall be conducted outside the
20 presence of the jury. However, if the hearing is conducted after a
21 jury trial has begun, the judge presiding at the hearing may consider
22 evidence already presented to the jury in deciding whether the
23 elements of subdivision (a) have been met.